
No. 03-3563

**In the United States Court of Appeals
for the Eighth Circuit**

ROBERT JOHNSON
Plaintiff/Appellant

V.

JO ANNE B. BARNHART, COMMISSIONER,
SOCIAL SECURITY ADMINISTRATION
Defendant/Appellee

ON APPEAL FROM THE
UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF ARKANSAS
JONESBORO DIVISION

BRIEF OF APPELLANT

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SUMMARY OF THE CASE
AND REQUEST FOR ORAL ARGUMENT

This is an appeal by Robert Johnson from an Order of the United States District Court for the Eastern District of Arkansas, affirming the Commissioner's decision which denied Johnson's application for supplemental security income (Title IX). Johnson filed an application for benefits in March 1997. His claim was denied through all administrative levels. He sought review of the Commissioner's decision in the United States District Court for the Eastern District of Arkansas, arguing that it was not supported by substantial evidence. On September 18, 2003, the district court affirmed the Commissioner's decision. This appeal followed.

The appellant believes that oral argument would be of material assistance to the Court in deciding this case, and thus, respectfully requests that his attorney be given fifteen minutes in which to present oral argument.

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JURISDICTIONAL STATEMENT

(i) This appeal is from an order filed on September 18, 2003, in the United States District Court for the Eastern District of Arkansas, Jonesboro Division, No. 3:02CV00118-JFF, issued by the Honorable John F. Forster, United States Magistrate Judge.

(ii) The United States District Court for the Eastern District of Arkansas had proper jurisdiction to review a final decision of the Commissioner of the Social Security Administration pursuant to 42 U.S.C. § 405(g).

(iii) Pursuant to 28 U.S.C. § 1291, this Court has jurisdiction to review the final judgment of the United States District Court entered on September 18, 2003, from which the appellant filed a timely notice of appeal on October 10, 2003.

STATEMENT OF THE ISSUE

Whether the Commissioner's decision that Robert Johnson is not disabled within the meaning of the Social Security Act is supported by substantial evidence on the record as a whole.

Battles v. Shalala, 36 F.3d 43, 44 (8th Cir. 1994)

Boyd v. Sullivan, 960 F.2d 733 (8th Cir. 1992)

Payton v. Shalala, 25 F.3d 684 (8th Cir. 1994)

STATEMENT OF THE CASE

Robert Johnson filed an application for supplemental security income (SSI) on March 10, 1997. (Tr. 115-119). His application was denied initially and on reconsideration. (Tr. 104-112). A hearing was held before an administrative law judge (ALJ) on April 8, 1998, which Johnson attended with his attorney and one lay witness. (Tr. 48-66). The ALJ issued an unfavorable hearing decision on October 29, 1998. (Tr. 203-220). On May 11, 2001, the Appeals Council remanded the case for further proceedings. (Tr. 231-235). A second hearing was held on November 20, 2001, which Johnson attended with his attorney and a vocational expert. (Tr. 67-101). The ALJ subsequently denied the claim on December 26, 2001 (AD 1-11; Tr. 13-23). The Appeals Council affirmed his decision on March 27, 2002. (AD 12-13; Tr. 6-7). Johnson sought review of the Commissioner's decision in the United States District Court for the Eastern District of Arkansas, arguing that it was not supported by substantial evidence. On September 18, 2003, the district court affirmed the Commissioner's decision. (AD 14-22). This appeal followed.

STATEMENT OF FACTS

A. Testimonial and documentary evidence.

1. *First administrative hearing (April 8, 1998).*

Robert Johnson was fifty-four years old at the time of the first hearing. He testified that he had no source of income but lived with his wife and grandchild who both draw checks. He attended school to the sixth grade, can read and write some, and can do “sums.” He can manage “a little bit” but his sons help him. When he was in school, his grades were not too good. “I wasn’t on it, too good in my mental, [too] good in my studies” He has a driver’s license, but does not drive much. He stated that his mind “is strange” when he is driving and he tends to forget where he is going. (Tr. 51-52, 56).

Johnson suffers from back pain. At the time of the hearing, he was taking Ibuprofen, 800 mg., up to four times a day for pain. He also uses over-the-counter Icy Hot and Doan’s back pills, and he takes a blood pressure medication (Tr. 53). He sleeps on the floor most of the time. He goes to bed very late (around 3:00 a.m.) because he does not sleep well at night. He gets around three to three and one-half hours a sleep a night. (Tr. 55).

Johnson testified that his pain increases with movement. He gets weak in his legs, feels nervous, and starts shaking (Tr. 55). If he walks two blocks, he starts feeling pain in his back and hip, which he likened to a needle sticking him. Then his legs become weak. (Tr. 56). His right hand gives him problems at times causing

him to drop things. (Tr. 57). He testified that he tries to exercise but this makes his pain worse. Even with medication, the pain still really bothers him (Tr. 60).

Johnson testified that he gets “down” because he is unable to work and do for his family the way he wants to. When he feels bad, he gets angry and upset and is hard to get along with. (Tr. 57). Johnson stated that he had “pretty bad” depression. He cries and does not want to be around people. (Tr. 60-61). He used to want to be with his friends, now he wants to be alone and sometimes acts unkindly toward his wife when he is feeling bad. He sometimes feels like giving up. (Tr. 61).

Johnson testified that he also has dizzy spells on nearly a daily basis. He gets headaches and his eyesight gets dim “like a haze.” (Tr. 58). He indicated that he was involved in a truck accident in his past where he was unconscious for a period of time. At the time of his accident, Johnson’s doctor told him that later in life he might start to have memory problems. He tends to forget where he put things and he stopped going to the store because half way there he forgets where he is going. (Tr. 59). He stays tired and weak all the time. When he gets tired, he starts to get pains in his chest and down into his arm. (Tr. 59).

Sarah Johnson, the claimant’s wife, also testified at the hearing. She said that her husband testified truthfully. She added that Johnson has a lot of pain and cannot rest at night. (Tr. 64).

2. Second administrative hearing (November 20, 2001).

Johnson was fifty-eight years old at the time of the second hearing. (Tr. 71). He testified that he had been drawing unemployment, having been fired from a job he had been working for two and a half years. (Tr. 73). He was working as a janitor, making \$640 every two weeks. (Tr. 76, 80).

Johnson testified that because he was working by himself he got away with a lot of things (Tr. 81). He could sit down or lay down whenever he got to feeling bad, but he still did his work to the satisfaction of his employer (Tr. 82, 88). He would rest four to five times a day and nobody knew. (Tr. 89). Had he not taken these breaks, Johnson did not think he could have done the job. (Tr. 89). He described mopping for thirty minutes or sweeping for thirty to forty-five minutes, then taking about a fifteen minute break. (Tr. 90). Johnson testified that he had to carry two buckets of mop water at a time with three gallons in each bucket up and down stairs. (Tr. 91). At the end of the work day, Johnson could hardly get out of his car. (Tr. 92). Johnson testified that he has pain in his hips and back. (Tr. 95). He takes over-the-counter medicine for pain (six BC and six to seven Tylenol per day). (Tr. 96).

Ken Waits, a vocational expert (VE), also testified at the hearing. He classified Johnson's past work as a janitor and fruit picker as unskilled and medium in exertion. (Tr. 97). The ALJ posed the following hypothetical question to the VE:

Please consider a hypothetical claimant much like the claimant we have here today, the claimant's age, education, and work experience. Please consider issues related to his education, his IQ, borderline

education, sixth grade, I've considered alcohol issues in the file, hypertension, arthritis and diabetes (INAUDIBLE), and exertionally this individual can work at the medium level, and lift up to 50 pounds occasionally, and ten pounds more frequently, no restrictions in sitting, no restrictions in standing and walking, no real postural restrictions. I've considered his testimony related to pain. I made a finding that his pain is mild and controlled with over the counter medication. He has no, really no doctors have been seen for the pain of arthritis. Mentally because of the education, IQ, simple, unskilled, semi-skilled type of work. This individual has demonstrated from his work history, but can understand, follow and remember concrete instructions. As he testified, and as reflected in his work history he can work with co-workers, supervision and the public. With those restrictions can this individual perform his past relevant work? (Tr. 98-99).

The VE replied that the hypothetical individual could perform Johnson's past relevant work of custodian. (Tr. 99). He also testified that the individual could work as a hospital cleaner and kitchen helper. (Tr. 99, 100).

B. Medical evidence.

Relevant medical evidence in the record indicates that Trent Marcus, M.D., Johnson's family physician, treated Johnson in December 1995 for severe hypertension. He was started on Normadine. (Tr. 175). On a follow-up visit, Dr. Marcus noted that Johnson blood pressure was improved but he added Hydrochlorothiazide to Johnson's medication regimen. (Tr. 174). Johnson again was seen by Dr. Marcus on October 11, 1996. At that time, Dr. Marcus noted that Johnson's blood pressure was well controlled on Normadyne and HCTZ. He gave Johnson five refills on his medication. (Tr. 173).

On June 19, 1997, Dr. Marcus performed an examination of Johnson at the request of the Social Security Administration (SSA). Johnson reported to Dr.

Marcus that he was having headaches, pain in his back, hips, legs, arms and hands, and depression. (Tr. 177). Johnson reported hurting all the time, getting mad and upset easily, and having trouble being around anyone else. (Tr.177). Dr. Marcus' exam showed Johnson's blood pressure to be 146/94. (Tr. 179). Range of motion testing revealed limited range of motion on flexion-extension to approximately 50% of normal. (Tr. 180). Dr. Marcus diagnosed chronic low back pain with osteoarthritis, noncardiac chest pain, headaches, hypertension, and possible depression. (Tr. 183).

Johnson underwent a psychological evaluation performed by Richard C. Maddock, Ph.D., in August 1998, also at the request of the SSA. Dr. Maddock observed that Johnson was walking with the assistance of a cane. His gait was labored and he walked with a limp. Speech was very pressured which made Johnson difficult to understand when he tried to communicate. (Tr. 194). On the Wechsler Adult Intelligence Scale-Revised (WAIS-R), Johnson had a verbal IQ score of 64, a performance IQ score of 60, and a full-scale IQ score of 58. Dr. Maddock noted that Johnson appeared to be totally confused by most of the instructions and directions, and that once they were given to him, he just did not seem able to execute them. (Tr. 194-195).

On the WRAT-3 test, Johnson again had difficulty with all areas since he could not read or write and his arithmetic skills were very poor. (Tr. 195). Johnson scored at the first grade level in academics. (Tr. 196). Results of the House-Tree-Person test indicated that Johnson defended against feelings of inadequacy through

repression. He tended to have feelings of personal inadequacy and ineffectiveness. He tended to withdraw as a means of defense. (Tr. 196). Introversive tendencies were also noted. (Tr. 197). Results on the Bender Gestalt Test were indicative of cognitive disorganization and possibly psychotic thought processes as well as problems maintaining adequate interpersonal relationships. Similar test results tended to be associated with moderately severe psychological problems. (Tr. 197).

Results of the Wahler Physical Symptoms Inventory strongly suggested both somatic components to Johnson's complaints and malingering. However, Dr. Maddock cautioned that what needed to be considered was that Johnson was extremely limited and concrete in his thinking and, if he did have emotional problems—"which he does"—he would likely convert everything that happened to him into physical problems because of the concrete and limited nature of his intelligence. (Tr. 198). Johnson's results on the MMPI indicated he had answered randomly many items without regard to their content. Since the test was not completed properly, the results were invalid. Dr. Maddock stated that Johnson's failure to accurately respond to test items could be due to "lack of cooperation, extreme confusion, or lack of comprehension due to limited reading or language skills." (Tr. 198). Dr. Maddock noted that Johnson did appear confused all through the testing process and that everything had to be explained a second and third time. (Tr. 198).

Regarding Johnson's cognitive functioning, Dr. Maddock observed that Johnson expressed many unusual ideas, perceptions and experiences. He stated that this

may result in confusion, difficulty in distinguishing between fantasy and consensual reality, and impairment in social functioning. There were indications that concerns in the area of reasoning and judgment might relate to oversensitivity, suspiciousness and adherence to certain convictions and assumptions. (Tr. 198-99). Dr. Maddock noted that Johnson expressed much difficulty with depression and anxiety, as well as many health related worries and concerns. There were also indications of social introversion. (Tr. 199).

Following his evaluation, Dr. Maddock made the following diagnoses: malingering, alcohol abuse and borderline personality disorder. In concluding his report, Dr. Maddock stated:

Mr. Johnson is functioning within the Mild Mental Retardation range of measured intelligence. Since rapport was established and testing conditions were optimal, *the results on this test are believed to be an accurate measure of his intellectual abilities*. Test results suggest that he may be expected to have difficulties following simple and complex instructions. However he is capable of performing most basic activities of daily living, such as feeding, dressing, bathing, etc.

Mr. Johnson may also be expected to present problems related to alcohol abuse. He was very honest about this. He said that whereas alcohol (beer) did not appeal to him in the past, he had found himself drinking more and more because he feels that he is using it to treat his nervous disorder and also to treat the back pain that he experiences

Mr. Johnson is not capable of managing funds, if awarded. (Tr. 200) (emphasis added).

Dr. Maddock completed a medical assessment form which indicated that Johnson is *seriously limited* in his ability to follow work rules, relate to co-workers, deal with the public, use judgment, deal with work stress, function independently,

maintain attention and concentration, behave in an emotionally stable manner, relate predictably in social situations, and demonstrate reliability. (Tr. 201-02).

Dr. Brewer Rhodes examined Johnson in January 2001 in connection with a disability claim for American Public Life Insurance Company. He diagnosed Johnson as suffering from degenerative joint disease of the hips and lower back. (Tr. 269-270).

Dr. Maddock tested Johnson again in September 2001, at the request of the SSA. During that evaluation Dr. Maddock indicated that it was necessary to loan Johnson some reading glasses, indicating that he had some ability to read and write, though his wife indicated that his reading and writing were very limited. (Tr. 271). Dr. Maddock noted that Johnson made every effort to cooperate during the evaluation. (Tr. 274).

Dr. Maddock administered the MMPI-2, but indicated that the profile was invalid since Johnson answered randomly to many of the items without regard to their content. He stated that the failure to accurately respond to test items might be due to a lack of cooperation, extreme confusion, or a lack of comprehension due to limited reading and language skills. (Tr. 275). Results on the Beck Depression Scale indicated that Johnson's depression was in the range of "severe." Dr. Maddock stated, however, that this "self-report" was inconsistent with the self-report on the MMPI, but noted that Johnson might have difficulty in defining specific problems due to a high level of general distress or an acute state of

confusion. He stated again that Johnson's failure to respond to test items might be due to lack of cooperation, malingering or confusion. (Tr. 277).

Results of the Beck Anxiety Scale indicated mild to moderate anxiety. Dr. Maddock noted this to be consistent with Johnson's behavior during the evaluation when Johnson would began to stutter and stammer. (Tr. 277). The excessive amount of space between drawings on the Bender Gestalt Test was moderately correlated with hostility, acting out, and assertiveness. The expansive use of space tended to be associated with over assertion, rebelliousness, and/or egocentric actions. Collision tendency was present and might indicate some impulsiveness, poor planning, and problems with figure-ground perception. (Tr. 277). Three types of gestalt changes occurred suggesting possible problems maintaining adequate interpersonal relationships, difficulty dealing with affective stimuli and related problems in affective control and control of impulses. The presence of mild fragmentation suggested some problems with perceptual/motoric dysfunction, ability to abstract, and ability to synthesize. (Tr. 277). On the House-Tree-Person test, regressive tendencies were noted. Concern with over stability and security generated a degree of anxiety that found direct expression in behavior. Hostile feelings were noted as well as introversive and indications of immaturity, regression and withdrawal. (Tr. 278).

On the Wechsler Adult Intelligence Scale-Third Edition (WAIS-3), Johnson worked very slowly. Dr. Maddock noted that it was hard to understand how Johnson worked as a janitor if he worked as slowly and cautiously as he did on the

WAIS-3 test. (Tr. 278). He stated that Johnson would have a very difficult time attempting to meet production standards at the speed he worked during the evaluation. (Tr. 279). On the WAIS-3, Johnson had a lot of difficulty but was not as anxious and agitated as he had been during the clinical interview. He scored a verbal IQ of 61, performance IQ of 62, and full-scale IQ of 58, which placed him in the mild mental retardation range of measured intelligence. (Tr. 279).

The WRAT-3 test was administered to assess the level of achievement Johnson had reached. The results indicated that Johnson reads at a third grade level, spells at first grade level, and does math at a second grade level (Tr. 279). Scores on the Wechsler Memory Scale suggested that Johnson's memory was particularly strong and probably one of his more salient qualities (Tr. 280).

On the Computerized Assessment of Response Bias (CARB) test, which measures response bias or malingering, Dr. Maddock indicated that Johnson gave a questionable effort. While his performance was not clearly in the range of not attending to the tasks, the effort was significantly below that expected in well-motivated normal controls and persons with verified brain injury. The performance was likely to be obtained by individuals who were, consciously or unconsciously, exaggerating the extent and nature of clinical symptoms. (Tr. 280).

Dr. Maddock indicated that he had not been able to identify two or more areas with significant limitations in adaptive functioning and that Johnson's adaptive functioning was not consistent with a diagnosis of mental retardation. However,

Dr. Maddock went on to diagnose, among other things, mild mental retardation.

(Tr. 282). In concluding his report, Dr. Maddock stated:

This is a difficult case. He has taken the WAIS-3 two times and each time he has achieved the same scores, *which speaks to reliability and validity* of the test and to some extent, of the testee. However the CARB test has also indicated that malingering is in progress, albeit is not classical malingering but instead just a poor effort. Nevertheless, the fact that malingering is indicated by this test raises questions about all of the other tests that were given today. For example, his best work was on the Wechsler Memory Scale, but on the CARB . . . he did very poorly. This alone indicates that he is not being altogether truthful and honest with us in the picture that he is trying to present (Tr. 283) (emphasis added).

Dr. Maddock again completed an assessment form speculating that Johnson is “seriously limited” in the following areas: dealing with the public, using judgment, interacting with supervisors, dealing with work stresses, functioning independently, maintaining attention/concentration (Tr. 284), relating predictably in social situations and demonstrating reliability (Tr. 285).

On October 22, 2001, Johnson was seen at the Jonesboro Church Health Center with complaints of pain in his hip, leg and knee as well as increased anxiety with rages at time and decreased memory. Physical examination indicated that Johnson had tenderness in his knees with range of motion. His glucose was greater than 300. Diagnosis was multiple joint pain, diabetes mellitus, hypertension, and arthritis. Johnson was given prescriptions for Amaryl and Prinivil, and instructed on an 1800 calorie diet. He was further instructed to return in a week for evaluation of his glycemia. (Tr. 287). A return visit on October 29, 2001 indicated that claimant’s non-fasting glucose level was 197. Assessment was of diabetes

mellitus, newly diagnosed and hypertension. Johnson's Amaryl dosage was increased and his blood pressure medication was changed to Lotensin (Tr. 286).

C. Administrative proceedings.

On December 26, 2001, the ALJ issued an unfavorable decision denying Johnson's claim. (AD 1-11; Tr. 13-23). He evaluated Johnson's application for benefits according to the familiar five-step analysis prescribed by the Social Security regulations, *see* 20 C.F.R. § 416.920, and found:

1. Johnson has not engaged in substantial gainful activity since the alleged onset of his disability.
2. The medical evidence establishes that Johnson suffers severe impairments.
3. Johnson does not have any impairment(s) that meet or equal an impairment listed in Appendix 1.
4. Johnson's subjective allegations are not totally credible. He has the residual functional capacity to perform work at the medium exertional level that is simple and unskilled. Her past relevant work as a custodian-cleaner did not require the performance of activities precluded by these limitations. Because Johnson can return to his past relevant work, he is not disabled under the Social Security Act. (AD 10; Tr. 22).

On March 27, 2002, the Appeals Council denied Johnson's request for review. (AD 12-13; Tr. 6-7). Thus, the ALJ's decision stands as the final decision of the Commissioner and it is from this decision that Johnson seeks judicial review.

SUMMARY OF THE ARGUMENT

The Commissioner's decision denying Robert Johnson's claim for supplemental security income is not supported by substantial evidence on the record as a whole. The ALJ improperly rejected the validity of Johnson's IQ scores, which show him to be suffering from mild mental retardation and, therefore, qualified for disability under the listing for mental retardation.

ARGUMENT

THE COMMISSIONER'S DECISION DENYING ROBERT JOHNSON'S CLAIM FOR DISABILITY INSURANCE BENEFITS IS NOT SUPPORTED BY SUBSTANTIAL EVIDENCE ON THE RECORD AS A WHOLE.

A. Standard of review.

Judicial review of the Commissioner's denial of benefits determines whether the Commissioner has correctly applied the law and whether there is substantial evidence on the record as a whole to support his decision. 42 U.S.C. § 405(g); *Keller v. Shalala*, 26 F.3d 856, 858 (8th Cir. 1994). Substantial evidence is not the same as any evidence; it is less than a preponderance, but enough that a reasonable mind might find adequate to support the Commissioner's conclusion. *Robinson v. Sullivan*, 956 F.2d 836, 838 (8th Cir. 1992). Moreover, "[t]he substantial evidence test employed in reviewing administrative findings is more than a mere search of the record for evidence supporting the [Commissioner's] findings." *Gavin v. Heckler*, 811 F.2d 1195, 1199 (8th Cir. 1987). The reviewing court must look for substantial evidence on the record as a whole, which requires the court to "take into account whatever in the record fairly detracts from its weight." *Universal Camera Corp. v. NLRB*, 340 U.S. 474, 488 (1951). Thus, the court must consider the weight of the evidence supporting the Commissioner's decision and how contradictory evidence detracts from that weight. *Gavin*, 811 F.2d at 1199 (noting that *Universal Camera* requires a "searching inquiry" into how any contradictory evidence balances out). See *Robinson*, 956 F.2d at 838 (emphasizing that the court must "do more than merely parse the record for substantial evidence supporting

the [Commissioner's] decision. [It] also must consider evidence in the record that detracts from the weight of the decision.”); *Wilson v. Sullivan*, 886 F.2d 172, 176 (8th Cir. 1989) (reversing the district court's decision because the magistrate failed to take into account the weight of the evidence upon which the ALJ relied and to apply a balancing test to any contradicting evidence).

B. The regulatory framework.

The Commissioner has adopted regulations creating a five-step test to determine whether a claimant is disabled. *See* 20 C.F.R. § 416.920(a)-(f); *Bowen v. Yuckert*, 482 U.S. 137, 140-42 (1987) (describing the process). The first two steps involve threshold determinations as to whether the claimant is not presently working and has an impairment which is of the required duration and which significantly limits his ability to work. 20 C.F.R. § 416.920(a)-(c). In the third step, the medical evidence of the claimant's impairments is compared to a list of impairments presumed severe enough to preclude any gainful work. *See* 20 C.F.R. pt. 404, subpt. P, App. 1. If an impairment matches or is equal to one of the listed impairments, the claimant qualifies for benefits without further inquiry. *Id.* § 416.920(d). If the claimant cannot qualify under the listings, the analysis proceeds to the fourth and fifth steps. At these steps, the inquiry is whether the claimant can do his own past work or any other work that exists in the national economy, in view of his age, education, and work experience. *Id.* § 416.920(e)-(f). If a claimant demonstrates that he cannot perform his past work, the burden shifts to the Commissioner to show that there are other jobs in the national economy the

claimant can perform. *Reed v. Sullivan*, 988 F.2d 812, 815 (8th Cir. 1993). If the claimant cannot do his past work or any other work, he qualifies for benefits.

C. The ALJ's determination that Robert Johnson does not suffer from mental retardation is not supported by substantial evidence on the record as a whole.

Robert Johnson is mentally retarded. Twice his IQ has been tested and twice it fell within the range for mental retardation. The ALJ discounted the severity of Johnson's mental retardation because he believed that the IQ testing was tainted by Johnson's embellishment or exaggeration in order to get disability benefits. This characterization is not supported by the record. At the very least, Johnson's case should be remanded so that the record can be fully and accurately developed concerning his mental retardation.

Johnson first underwent IQ testing in August 1998. On the Wechsler Adult Intelligence Scale-Revised (WAIS-R), administered by Dr. Maddock, Johnson had a verbal IQ score of 64, a performance IQ score of 60, and a full-scale IQ score of 58. (Tr. 195). Johnson again was tested in September 2001. On the WAIS-3, he scored a verbal IQ of 61, performance IQ of 62, and full-scale IQ of 58, which placed him in the mild mental retardation range of measured intelligence. (Tr. 279). Mild mental retardation generally describes an IQ range of 50-55 to 70. *Diagnostic and Statistical Manual of Mental Disorders (DSM-IV)* 39-40, 45, 684 (4th ed. 1994).

If these scores accurately reflect Johnson's level of intellectual functioning, then the ALJ's decision is erroneous on at least two counts. First, the decision fails to

properly assess whether Johnson is disabled under the listings for mental retardation. Listing 12.05B in Appendix 1 states that a claimant is considered disabled due to mental retardation when he has “[a] valid verbal, performance, or full scale I.Q. of 59 or less.” 20 C.F.R. Pt. 404, Subpt. P, App. 1, § 12.05B. Listing 12.05C in Appendix 1 states that the required level of severity for mental retardation is satisfied when a claimant shows “[a] valid verbal, performance, or full scale I.Q. of 60 through 70 and a physical or other mental impairment imposing additional and significant work-related limitation of function.” *Id.* § 12.05C. Johnson’s IQ scores, if valid, would require a finding of disability under listing 12.05B, based on the scores alone, and under listing 12.05C, based on the scores and his additional severe physical impairments. Second, even if Johnson somehow is not disabled under the listings, the severity of his mental retardation would have to be accurately described in the ALJ’s hypothetical to the VE for the VE’s response to be considered substantial evidence supporting the ALJ’s decision. *See Porch v. Chater*, 115 F.3d 567, 572-73 (8th Cir. 1997) (stating that testimony from a vocational expert is substantial evidence only when the testimony is based on a correctly phrased hypothetical question that captures the concrete consequences of a claimant’s deficiencies).

The ALJ discounted the IQ test scores because Dr. Maddock, the administering psychologist, had concluded that Johnson was malingering and exaggerating. (AD-5; Tr. 17). There are several reasons why the ALJ’s reliance on Dr. Maddock’s

characterization of Johnson as malingering was improper. The validity of Dr. Maddock's conclusion is not supported by his own findings.

First, Dr. Maddock's initially concluded that Johnson's IQ scores were valid and that his intellectual deficits imposed major work-related limitations. After evaluating in July 1998, Dr. Maddock concluded that "Johnson is functioning within the Mild Mental Retardation range of measured intelligence. Since rapport was established and testing conditions were optimal, *the results on this test are believed to be an accurate measure of his intellectual abilities.*" (Tr. 200). Dr. Maddock further stated that "[t]est results suggest that [Johnson] may be expected to have difficulties following simple and complex instructions" (Tr. 200) and he completed a medical assessment form which indicated that Johnson is *seriously limited* in his ability to follow work rules, relate to co-workers, deal with the public, use judgment, deal with work stress, function independently, maintain attention and concentration, behave in an emotionally stable manner, relate predictably in social situations, and demonstrate reliability. (Tr. 201-02). These limitations directly contradict and far exceed the ALJ's finding that Johnson is limited only to simple unskilled work.

Second, Dr. Maddock apparently was inclined to find that Johnson was malingering, regardless of the difficulties Johnson had in test taking. After the first exam, Dr. Maddock diagnosed Johnson as malingering based on Johnson's failure to complete the MMPI-2 properly and his scores on the Whaler Physical Symptoms Inventory. (Tr. 198). Regarding the MMPI-2, Dr. Maddock noted that "[t]he failure

to accurately respond to test items may be due to a lack of cooperation, extreme confusion, or lack of comprehension due to limited reading or language skills.” (Tr. 198). Dr. Maddock noted that Johnson did appear confused all through the testing process and that everything had to be explained a second and third time. (Tr. 198). The WRAT-3 test showed that Johnson was reading, spelling, and doing arithmetic at a first-grade level. (Tr. 196). Regarding Johnson’s scores on the Whaler Physical Symptoms Inventory, Dr. Maddock noted that

[w]hat needs to be considered . . . is the fact that [Johnson] is extremely limited and concretistic in his thinking and if he did have emotional problems, which he does, he would never be able to conceptualize them in a constructive manner. He is quite likely to convert everything that happens to him to a physical problem because of the concrete and limited nature of his intelligence. (Tr. 198).

Dr. Maddock’s diagnosis of malingering after the second exam was based on Johnson’s results on the Computerized Assessment of Response Bias (CARB), which suggested that Johnson was giving “questionable effort” on this test. (Tr. 280). Yet, when assessing Johnson’s attitude during the exam, Dr. Maddock found that Johnson “made every effort to cooperate.” (Tr. 274). Dr. Maddock also noted the effect of Johnson’s limited intelligence on his test-taking ability: he worked “very slowly” (Tr. 278); “had a lot of difficulty” (Tr. 279); was “very limited” on most of the verbal subtests (Tr. 279); and was never able to grasp the concept of “alike” on the similarities subtest (Tr. 279). No mention was made of any malingering or lack of effort. Moreover, Dr. Maddock concluded that Johnson’s adaptive functioning was not consistent with a diagnosis of mental retardation

based solely on Johnson's ability to "work and hold down a job." (Tr. 282). But Dr. Maddock surely knows that the ability to perform menial or unskilled jobs is not inconsistent with a claim of mental retardation. People who are mildly mentally retarded are capable of holding jobs, having social relationships, and performing basic household duties. The profile for mild mental retardation in the *Diagnostic and Statistical Manual of Mental Disorders* is clearly contrary to Dr. Maddock's view:

Mild Mental Retardation is roughly equivalent to what used to be referred to as the educational category of "educable". . . . During their adult years, [the mildly-retarded] usually achieve social and vocational skills adequate for minimum self-support, but may need supervision, guidance, and assistance, especially when under unusual social or economic stress. With appropriate supports, individuals with Mild Mental Retardation can usually live successfully in the community, either independently or in supervised settings.

Diagnostic and Statistical Manual of Mental Disorders (DSM-IV) 41 (4th ed. 1992).

Indeed, the Commissioner's own regulations recognize that a person with mild mental retardation can be capable of working. That is why listing 12.05C requires that the claimant not only be mildly retarded, but also have an *additional* physical or mental impairment causing significant work-related limitation of function.¹ Johnson's work history is limited to brief unskilled or menial jobs that paid at or near minimum wage. Contrary to the Dr. Maddock's view, his performance of such work does not prove that his IQ scores are invalid. See *Brown v. Secretary of Health and Human Services*, 948 F.2d 268, 269-70 (6th Cir. 1991) (concluding that

¹ It is only when a claimant's IQ is 59 or less that she can be considered presumptively disabled based on IQ scores alone. 20 C.F.R. Part 404, Subpt. P, App. 1 § 12.05B.

claimant's work as truck driver was not inconsistent with mild mental retardation); *Neives v. Secretary of Health and Human Servs.*, 775 F.2d 12, 14 (1st Cir. 1985) (concluding that claimant's prior work as a seamstress was consistent with mild form of retardation contemplated in listing 12.05C)

Third, Dr. Maddock's conclusion that Johnson was malingering is, at best, equivocal. He diagnosed Johnson as suffering from *both* malingering and mild mental retardation, demonstrating his uncertainty regarding the extent of Johnson's malingering and its effect on his IQ scores. In concluding his second report, Dr. Maddock found this to be "a difficult case," noting that Johnson "has taken the WAIS-3 two times and each time he has achieved the same scores, *which speaks to reliability and validity* of the test and to some extent, of the testee." (Tr. 283). The CARB results, Dr. Maddock indicated, do not suggest classical malingering, but rather just "poor effort." (Tr. 283). Without explanation, he assumed that "the fact that malingering is indicated by this test raises questions about all of the other tests that were given today." (Tr. 283). Given the CARB results, Dr. Maddock concluded that "[w]e do not have a clear and concise picture of him which is what we try to achieve in every evaluation." (Tr. 283).

An administrative hearing is not an adversarial proceeding. *Battles v. Shalala*, 36 F.3d 43, 44 (8th Cir. 1994). Both the Commissioner and the participants have but one goal—to see "that deserving claimants who apply for benefits receive justice." *Sears v. Bowen*, 840 F.2d 394, 402 (7th Cir. 1988). Therefore, the ALJ has a duty to develop the record fully and fairly even when, as here, the claimant is represented

by counsel. *Battles*, 36 F.3d at 44; *Boyd v. Sullivan*, 960 F.2d 733, 736 (8th Cir. 1992). When the ALJ has failed to fully develop the record, this Court has required the Commissioner to reopen the case until the evidence is sufficiently clear to make a fair determination as to whether or not the claimant is disabled. *See Payton v. Shalala*, 25 F.3d 684, 686 (8th Cir. 1994).

The fact that Dr. Maddock found that Johnson's IQ scores were valid but then backed off that conclusion based on questionable effort by Johnson on one test suggests that Dr. Maddock's conclusions may be tainted by a desire to render a conclusion favorable to the agency who employed him. The inconsistencies in his reports, his unsubstantiated examination findings, and his uncertainty regarding the effects of Johnson's supposed malingering render his reports unreliable in accurately assessing Johnson's mental impairments. The case should be remanded for further development of the record, including obtaining an expert opinion regarding Johnson's mental retardation from someone other than Dr. Maddock.

CONCLUSION

For the reasons set forth above, the Commissioner's decision that Robert Johnson is not disabled is not supported by substantial evidence. The final decision of the Commissioner should be reversed and the case should be remanded for proper evaluation of Johnson's claim.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE WITH FRAP 32(a)(7)
AND EIGHTH CIR. R. 28A(c)

The undersigned hereby certifies that this brief complies with Federal Rule of Appellate Procedure 32(a)(7) regarding type and volume limitations. The word count is 6,062. The word processing software used is Microsoft Word X for the Macintosh. A copy of the brief has been provided to the Court and Appellee's counsel on CDs. The brief has been converted to Adobe PDF format. The CDs have been scanned for viruses and are virus free.

E. Gregory Wallace

December 15, 2003

CERTIFICATE OF SERVICE

I, E. Gregory Wallace, do hereby certify that I have served a copy of the above and foregoing document on the defendant by mailing a copy of the same to the Ruben Montemayou, Office of the General Counsel, Social Security Administration, 1100 Commerce Street, Suite 573, Dallas, Texas 75202, on this 15th day of December 2003.

E. Gregory Wallace

ADDENDUM

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